Osgoode Hall Law Journal

Volume 25, Number 4 (Winter 1987)

Article 4

Authors' Moral Rights: Reform Proposals in Canada: Charter or Barter of Rights for Creators?

David Vaver
Osgoode Hall Law School of York University, dvaver@osgoode.yorku.ca

AUTHORS' MORAL RIGHTS - REFORM PROPOSALS IN CANADA: CHARTER OR BARTER OF RIGHTS FOR CREATORS?*

BY DAVID VAVER**

I. INTRODUCTION

Case 1: The movie studio that commissioned the film "Brazil" preferred a happier ending than the one created by the producer. It refused to release the film unless the ending was changed. The producer, Terry Gilliam, ex-"Monty Python" and no stranger to moral rights litigation,[1] refused to make the change; his contract required alterations to be approved by him. Gilliam is quoted as saying: "It became a fight over who's the boss, whether ... the studio would be in control or whether it would be me as the artist."[2] The studio grudgingly changed its mind and released the

---

**Professor of Law, Osgoode Hall Law School. An earlier version of this article was initially presented at a meeting in Montréal of L'Association Littéraire et Artistique Internationale (ALAI), Section Canada, at l'Université du Québec à Montréal on February 26, 1986, and later at a faculty seminar on September 24, 1986, at Osgoode Hall Law School. I am grateful to participants at both sessions for their valuable comments, many of which have been incorporated into the final manuscript. I am particularly grateful to my colleague Professor Reuben Hasson for his helpful suggestions on an earlier draft, and to the Social Sciences and Humanities Research Council of Canada for providing me with leave time in 1985 to study *A Charter of Rights for Creators*.

[1] *Gilliam* v. *American Broadcasting Companies Inc.* (1976), 538 F.2d 1.

[2] R. Base, "All's Well that Ends Well for Brazil" *Toronto Star* (26 January 1986) F1 at F8.

film after the Los Angeles Film Critics' Association voted "Brazil" the best movie for 1985.

Case 2: Motion picture directors told a meeting of the U.S. National Association of Television Program Executives that television stations airing movies edited for television should run notices at the beginning and end of the film and at the beginning of each commercial break, indicating if the film had been edited and, if so, whether this had occurred with the director's co-operation. The directors indicated that their Guild would seek to negotiate the matter this year. The suggestion "prompted nervous titters from the audience."[3]

Case 3: The world premiere of Sidney Lumet's film "Power" at the 8th U.S. Film Festival at Park City, Utah, was aborted when, three-quarters through the filming, the studio executives realized that the film reels were being shown out of order. The studio president and the producer were out taking a walk at the time. A visitor at the screening is reported as saying that "if this had happened at the Tokyo Film Festival, the projectionist would have committed hari-kiri by now."[4]

Case 4: The copyright owner of Carson McCullers' novel "The Member of the Wedding," published in French in 1949 under the title "Frankie Adams," complained that Claude Miller's recent prize-winning film "L'Effrontée" infringes the former's copyright. Miller is reported as saying: "I have never intended to hide that [McCullers'] influence ran through my picture. I do not believe, however, that I have made an adaptation of this beautiful book." He added that many other influences and references, such as Colette, Mark Twain, Charles Dickens, Balthus, Andrew Wyeth,

---

[3] *Variety* (22 January 1986) 32. The pressure seems already to have borne fruit. A Los Angeles station airing an uncut version of "One Flew over the Cuckoo's Nest" had director Milos Forman on camera before the start of the film, praising the "very civilized and noble" example of the station: *Globe & Mail* (21 February 1986) C3.

[4] *Ibid.* at 5, 30.

Auguste Renoir, François Truffaut, Joshua Logan and Ingmar Bergman, were also to be found in his film.[5]

Case 5: The author of the recently released unauthorized biography, "Barbra Streisand: The Woman, The Myth, The Music" claims in the book that Streisand did not write her Oscar-winning song "Evergreen" alone, but with the uncredited help of singer-songwriter Rupert Holmes. Streisand and Holmes have both issued statements denying that Holmes composed or collaborated on any part of the song.[6]

The above items appeared during the same week in two newspapers; one a daily, the other a trade paper. Since then, a fierce, as yet unresolved, debate has arisen about whether colourizing black-and-white movies for television exhibition violates the interests of directors, and actors, as well as the artistic integrity of the films.[7] These examples indicate how frequently issues involving authors' moral rights occur; in particular, the right to have the work correctly attributed and the right not to have it distorted, and the importance and sometimes subtlety of the issues concerned to the various parties involved.

The recent Canadian Parliamentary Subcommittee Report entitled *A Charter of Rights for Creators*[8] stated that authors need

---

[5] *Ibid.* at 1, 91.

[6] R. Harrington, "Streisand Steps Up the Shelling Over Book" *Toronto Star* (26 January 1986) D1-2.

[7] Greenstone, "A Coat of Paint on the Past? Impediments to Distribution of Colorized Black and White Motion Pictures" (1986) 5 Entertainment & Sports Lawyer 12; L. Bennetts, "Colorizing Film Classics: A Boon or a Bane?" *[New York] Times* (5 August 1986) 1, 21.

[8] Subcommittee on the Revision of Copyright of the House of Commons Standing Committee on Communications and Culture (1985, Minister of Supply and Services, Canada) [hereinafter *Charter of Rights for Creators*].

to have their *droit moral* recognized and enhanced: "moral rights should have as much importance as economic rights."[9]

I propose to assess this statement in the light of the current state of the law, including section 12(7) of the *Copyright Act*,[10] and in the light of the Report recommendations dealing with moral rights. On 27 May 1987, Bill C-60, incorporating the first round of proposed amendments to the *Copyright Act* and including provisions on moral rights, was given its first reading in the Canadian House of Commons. At press time, the Bill had passed third reading with amendments and was before the Senate. Since the Bill hews to much of the Report's policy, I shall also comment on the Bill's proposals.

II. MORAL RIGHTS THEORY

A. *Traditional Moral Rights Theory*

The intimate bond between an author[11] and his or her work has been the central idea underlying the development of the theory of moral rights in Europe since the end of the eighteenth century. The work is treated as an expression of the author's intellect and as an aspect of his or her personality. Any assault on the work by another is as much a trespass on the author's rights as is a trespass to his or her body or tangible property. Thus, an author should

---

[9] *Ibid.* at 6.

[10] R.S.C. 1970, c. C-30. The provision reads: "Independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation."

[11] "Author" is used here throughout, as in the *Copyright Act*, to encompass all creative people, including artists, composers and dramatists.

have the right to have the work correctly credited to him or her and to have it protected against distortions.[12]

This theory of moral rights is attractive for a number of reasons. First, it serves to organize moral rights as a form of personal, rather than proprietary, right – a necessity for legal systems accustomed to classifying and distinguishing property from personality. Second, it explains why an assignment of copyright in a work does not carry with it the author's moral rights, any more than an assignment transfers any other personal right, such as the author's ability to sue for defamation. Third, it emphasizes the continuing importance of the initial creator of the work – something that tends to be forgotten as the work is later commercially exploited by other persons more intent on protecting their own interests than those of others earlier in the creative process. Fourth, it recognizes the psychological injury an author suffers when his or her work fails to be credited correctly or at all, or when it is modified in a way that fails to accord with his or her original artistic intent. Authors are often proud of their work and want some societal recognition of it. Fifth, the theory underscores the importance of literature and the arts as part of a society's culture, and the public's interest in not having aspects of its culture falsified. The public interest is particularly emphasized in those jurisdictions which, while entrusting the author and his or her heirs with the power to vindicate moral rights during the term of copyright, vest the later exercise of those powers in a governmental agency.

B. *Moral Rights Theory Reformulated from a Social and Economic Perspective*

An explanation of moral rights theory based on the notion of the work as an outgrowth of the author's personality may be satisfying metaphysically or juristically. It is, however, incomplete because it ignores the social and economic context in which these rights have come to be asserted.

---

[12] Fitzpatrick C.J.C. accepted this theory in his judgment in *Morang & Co.* v. *Le Sueur* (1911), 45 S.C.R. 95 at 97-8.

The moral rights movement started gaining its impetus in the nineteenth century at a time when authors were becoming independent professionals free of the yoke of royal, ecclesiastical, and seigneurial patronage. Their ability to earn a living depended upon obtaining a reputation within their potential market. This reputation could accrue only if their name was associated with their works; the more an author's works became popular and his or her reputation was enhanced, the more marketable became his or her future works and the more income the author was able to earn.[13]

It may be distasteful to equate artistic endeavour with trade in goods or services, but the analogy is nonetheless appropriate for the many authors who rely on their creative talents for their livelihood. By the turn of this century, both the common law[14] and the civil law[15] recognized that traders were entitled to protect their goodwill against misrepresentation: no-one could adopt for his or her business or wares a name or mark deceptively similar to that of an existing trader, or palm off any goods, especially inferior ones, as the goods of the first trader. The same underlying purposes that passing off actions, however imperfectly, promoted and reinforced were present when authors sought to exercise their moral rights. Just like entrepreneurs, authors sought to create and strengthen their customer base, to prevent rivals reaping where they had not sown, and to ensure that their product and information about it in the marketplace were authentic so that consumers got what they thought they were paying for and what the producer intended them to get.

---

[13] Stephen Ladas recognized this point: "When the integrity of the work or its paternity is safeguarded, its commercial value to the author is also secured. The term 'moral right' cannot mean that this right is without economic importance and without influence on the material exploitation of the work." *The International Protection of Literary and Artistic Property* (New York: The Macmillan Company, 1938) vol. 1 at 576. Accord: Raestad, *La Convention de Berne revisée à Rome 1928* (Paris, 1931) at 77.

[14] *A.G. Spalding & Bros.* v. *A.W. Gamage Ltd* (1915), 32 R.P.C. 273 (H.L.).

[15] Dawid, ed., *Pinner's World Unfair Competition Law* (1978, Sijthoff & Noordhoff), vol. 4, title "Unfair Competition," *passim*.

C. *A Digression: Pseudonymous and Anonymous Works*

This reformulated theory is compatible with the author's right to produce works anonymously or pseudonymously. The fundamental principle of the law of passing off is that the market be told the truth about the connection between a product and its producer. An anonymous work tells no lie: the public is simply told that the author does not wish his or her identity revealed. An author who later wishes to announce his or her identity is free to do so.[16] Pseudonymous works do tell a little lie: the author's true identity is not revealed. Yet the practice protects an author's privacy and autonomy, and is an age-old and harmless device well-known to the public. It is also consistent with the law of passing off: a trade mark rarely reveals the identity of its owner, but this does not affect the mark owner's right to sue for passing off or trade mark infringement.[17]

An author's adoption of another author's pseudonym, however, constitutes a more serious deception. The law of passing off discourages this practice by recognizing that the goodwill in the pseudonym is vested in the first author, who may enjoin others, including his or her employer, from appropriating it.[18] Similarly, illiterate celebrities who pretend to write their memoirs but employ a ghost-writer to do so should also recognize the latter's right to be credited in some such form as "by [celebrity's name] with [ghost-writer's name]." Failure to give appropriate credit tells the public the lie that literacy is one of the celebrity's attributes, and denies the

---

[16] In France, the author may resile from an agreement for anonymity or concealed collaboration should he or she later want his or her identity revealed: Da Silva, "Droit Moral and the Amoral Copyright" (1980) 28 Bull. Copr. Soc. 1 at 29. Old U.S. case law suggesting a publisher can reveal the author's name against the latter's wishes is incompatible with the *droit moral: cf. Ellis* v. *Hurst* (1910), 128 N.Y.S. 144 aff'd without opinion 130 N.Y.S. 1110 (A.D.) with the more sensitive earlier opinion, *ibid.* (1910), 121 N.Y.S. 438 (S.C.).

[17] Blanco White & Jacob eds, *Kerly's Law of Trade Marks and Trade Names*, (11th ed. 1983) para. 16-32.

[18] See, for example, *Sykes* v. *John Fairfax & Sons Ltd*, [1978] F.S.R. 312 (N.S.W.); *Hines* v. *Winnick*, [1947] Ch. 708. For some problems involving group names, see Cooper, "Ownership and Protection of Performers' Names", in Meyer & Viera eds, *1984 Entertainment, Publishing and the Arts Handbook* (New York: Clark Boardman, 1984) at 149 ff.

ghost-writer the benefit of whatever fame is his or her due.[19] Any agreement denying or neglecting to give appropriate credit should accordingly be unenforceable on public policy grounds because it deceives the public.[20]

D. *Reformulated Theory Applied by Canadian Courts*

It is fundamental to a proper appreciation of the role and importance of moral rights doctrine to understand that it is in many cases concerned with the ability of an author to earn his or her livelihood and to obtain the reward for his or her works that the marketplace considers appropriate for those works. It is designed to reinforce the autonomy and individuality of the author. The public's reaction to a particular work will affect the value of the author's present and future works.[21] Decisions or proposals that weaken this

---

[19] The originator of an idea who uses someone else to put the idea into copyright form may also deserve appropriate credit. Thus, where the plot of a children's book was more important than the literary effort needed to put it into prose, a court thought the appropriate credit line was "by [story creator] with [ghost-writer]": *Courtenay* v. *Polkosnik* (1983), 77 C.P.R.(2d) 140 at 144 (Ont. H.C.). The court rejected the argument that the ghost-writer should receive no credit whatsoever. Similarly, in *Mitchell* v. *Brown* (1880), 6 V.L.R.(E.) 168 at 171, the court thought that a picture of the anatomy of a horse, produced by an artist from elaborate information supplied by a veterinary surgeon, should have dual credit: "I should be glad if some way could be found by which the plaintiff could get all the credit of its production as a veterinary work of art, and the defendant all the credit of it as a matter of pictorial art." The difficult question remains: what form should the credit take?

[20] *Paramount Productions* v. *Smith* (1936), 91 F.2d 863 at 867-68 (C.A.) (dissent). *Cf. Report of the Committee to consider the Law on Copyright and Designs* ("Whitford Committee"), Cmnd. 6732 (1977), para. 56: moral rights should be waivable in "the case of a ghost writer who, for a fee, will write the memoirs of some celebrity"; see *infra*, note 85.

[21] The point has been clearly recognized in English and Australian cases enforcing moral rights through the medium of contract law: see, for example, *Tolnay* v. *Criterion Film Productions Ltd* (1936), [1936] 2 All E.R. 1625 at 1626-27 (K.B.D.), Goddard J.; *Associated Newspapers Ltd* v. *Bancks* (1951), 83 C.L.R. 322 at 338 (Aust. H.C.).

That the value of a work depends upon the identity of its maker, as well as his or her standing according to contemporary taste, is also well recognized judicially: *Leaf* v. *International Galleries*, [1950] 2 K.B. 86 at 92 (C.A.) (dealer's innocent statement to buyer that painting was by Constable "was a representation of great importance, which went to the root of the contract and induced [the plaintiff] to buy"); *Smith* v. *Zimbalist* (1934), 38 P.2d 170 (Cal.Ct.App.) (sale of innocently misrepresented Guarnerius and Stradivarius violins held void for mistake); *cf. Shapiro* v. *Banque Canadienne Nationale* (1981), [1981] 4 W.W. R. 560, 123

link between the author and his or her prospective audience are not merely a metaphorical assault on the author's personality: they undermine the author's independence, and depreciate the market value of the work and, ultimately, the author's income.

Canadian case law has recognized and given effect to the author's economic necessity to have his or her work credited and to have its integrity respected. A Québec court labelled as "fraudes intolérables" the acts of a film-maker who took another's play, changed its title, and failed to credit the playwright. It went on to say: "un auteur a droit au crédit de son travail, au respect de ses textes, et aussi *au bénéfice matériel qui peut lui résulter du prestige de son nom ou de la vogue de ses oeuvres.*"[22]

Similarly, in assessing damages for infringement of an architect's copyright in building plans, a British Columbian judge took into account the plaintiff's loss "of the opportunity to enhance his reputation:"

> His plans have been used and yet he has had no credit for that. To be given credit in a timely and appropriate way is a matter of obvious importance, particularly to a young designer seeking to make his reputation. Had he given a licence, it would likely have been a term of that that he be allowed to have a sign on the project. Having in mind that the buildings are on a very prominent intersection, that would have been an advantage of considerable potential value.[23]

The court in *Goulet* v. *Marchand*[24] makes a similar point when assessing damages in respect of a co-author's complaint that he was not named as such on a published law text. Speaking of the effects of publication of a worthy book, Gagnon J. noted: "il appert plutôt

---

D.L.R.(3d) 630 (Man. Q.B.), aff'd (1982), [1983] 5 W.W.R. 768, 143 D.L.R. (3d) 574 (Man. C.A.) (buyer assumed risk at sheriff's sale that painting was by Suzor-Cote).

[22] *Joubert* v. *Géracimo* (1916), 26 Que. K.B. 97 at 110-11 (emphasis added). The case was principally concerned with the predecessor of s. 26(2) of the *Act*, making such acts criminal offences.

[23] *Kaffka* v. *Mountain Side Developments Ltd* (1982), 62 C.P.R. (2d) 157 at 163 (B.C.S.C.), Esson J.

[24] (18 September 1985) (Que. 200-05-002826-837) (Que. S.C.), Gagnon *J.* [hereinafter *Goulet*]. The decision was approved, but distinguished on the facts, in *Dion* v. *Trottier* (1986), 9 C.I.P.R. 258 at 262 (Que. S.C.).

que beaucoup de prestige et de chances d'avancement sont attachés à une telle publication pour des professeurs particulièrement."[25] Prestige and prospects for career advancement have obvious economic implications: they raise the author's market value both in his or her career and in any future work that he or she publishes. In *Goulet*, failure to credit the co-author cost him the opportunity to increase his marketability. The damages award accordingly reflected this loss.

A similar rationale can be discerned in *Snow* v. *The Eaton Centre Ltd*,[26] a case dealing with the right of integrity under section 12(7) of the *Copyright Act*. In this case an artist was able to compel the shopping mall owners of his sculpture to remove modifications they had made to it. The Ontario High Court upheld the artist's judgment that the modifications were "prejudicial to his honour or reputation" in terms of section 12(7) because his judgment was "reasonably arrived at."[27] I have argued elsewhere that the *Snow* decision affirms an artist's right to pursue his or her livelihood without officious intermeddling, however well-meaning, by others, and consequently the right to ensure that the art market fairly assesses his or her present and future works on their intrinsic merit, free of undesired extraneous influences.[28]

---

[25] *Ibid.* at 22 of the unreported judgment.

[26] (1982), 70 C.P.R.(2d) 105 (Ont.H.C.). Section 12(7) is set out at *supra*, note 10.

[27] Similarly, in deciding that a studio's deletion of four words from a television film writer's script constituted an impermissible "structural alteration" under the writer's contract with the studio, an English court held that the writer "prima facie, would appear to be the best judge" of the question and granted an interlocutory injunction preventing the altered film being aired: *Frisby* v. *British Broadcasting Corporation* (1967), [1967] 2 All E.R. 106 at 117 (Ch.).

[28] D. Vaver, "*Snow* v. *The Eaton Centre*: Wreaths on Sculpture Prove Accolade for Artists' Moral Rights" (1983) 8 Can. Bus. L.J. 81 at 93-94.

E. *"A Charter of Rights for Creators": Is it rather "A Barter of Rights?"*

The recommendations on moral rights contained in *A Charter of Rights for Creators*[29] clarify a number of matters. For example, moral rights are accorded the same remedies as ordinary copyright infringements, their term is made coincident with copyright, corporations are given moral rights, a moral "synchronization" right will control the context in which one's work appears; no modification of an original artistic work may be allowed to occur, whether or not the artist's honour or reputation is impaired, and moral rights are made freely assignable and waivable.[30]

These proposals do not however justify the Report's claims that it was *enhancing* moral rights and that these rights should be just as important as economic rights.[31] Rather, if the premise suggested earlier is accepted (that moral rights are integral to the author's independence and ability to earn a fair reward for his or her work) the Report is seriously deficient in a number of respects.

A letter dated 7 February 1986, sent jointly by the Minister of Consumer and Corporate Affairs and the Minister of Communications, transmitted the *Government Response* to the Report to the Subcommittee's Chairman. Page two of the Response indicated that the government "agree[d] in principle" with the Report's recommendations on moral rights. Two principal exceptions were noted. First, the new moral "synchronization" right would not extend to works for which a blanket licence had been granted to a collective society of copyright owners; consequently, users would not be obliged to obtain a second authorization for works that had been

---

[29] *Charter of Rights for Creators, supra*, note 8 at 6-8.

[30] *Ibid.* at 13.

[31] *Ibid.* at 6.

assigned to such societies to administer.[32] Second, on the issue of waiver or assignment of rights, including moral rights, "a provision will be incorporated in the *Act* to limit the term of licences and of the assignment of rights so as to protect creators from abuse."[33]

Bill C-60, which was introduced to amend the *Copyright Act*, only partly tracks the policy outlined in the *Government Response*. It proposes that section 12(7) of the old *Act* be replaced with new provisions that give a plaintiff whose moral rights have been breached the same remedies as a plaintiff whose copyright has been infringed (proposed sections 18.1, 20(1.1), and a new section 24), that moral rights be made coterminous with copyrights (section 21(1) of the Bill), that moral rights are to include a right to prevent the work from being associated with products, services, causes, or institutions to the prejudice of the author's honour or reputation (proposed section 18.2(1)(b)), and that the latter formula of prejudice to honour or reputation be dispensed with where moral rights in artistic works (other than architecture) are involved (proposed section 18.2(2)).

The Report, the *Government Response* to it, and now Bill C-60 all have some serious deficiencies. These include:

1. There is no right to withdraw a work.

No *droit de retrait*, or the right to withdraw one's work, is recommended, or even discussed, in the Report, nor does it find a place in Bill C-60. The Regroupement des Journalistes du Québec argued for this right before the Subcommittee, citing cases where magazines had changed direction between the time articles had been

---

[32] Government of Canada, "Government Response to the Report of the Sub-Committee on the Revision of Copyright", February 1986, at 2 [hereinafter *Government Response*]. The government's agreement in principle with the Report's recommendation that musical works should have moral rights is also made subject to this qualification: *ibid.* at 7.

[33] *Ibid.* at 2.

submitted and published.[34] The right of withdrawal is also important where the author's ideas or style has changed since the work has been submitted or published, so that continued exposure of the work becomes a source of embarrassment to him or her.

The *droit de retrait* is well established in many countries, including France and Germany. The utility of the right, however, is somewhat lessened by the requirement that the author reimburse the publisher for loss flowing from the withdrawal.[35] Yet the principle seems worthy of recognition. If an author is sufficiently embarrassed by the continuation of the work to be prepared to reimburse the publisher for its losses in order to have the work withdrawn, what possible opposing interest of the publisher is worth defending in such a case?

2. Employees may have no moral rights.

The current moral rights provision in section 12(7) of the *Copyright Act* may not, on its true interpretation, extend to employees. Neither the Report nor the *Government Response* clarifies the matter. Bill C-60 does not replicate the language of section 12(7) that gave rise to the difficulty and thus probably does not exclude employees from being the beneficiaries of moral rights.[36]

---

[34] *Minutes of Proceedings and Evidence of the Subcommittee of the Standing Committee on Communications and Culture on The Revision of Copyright*, Issue No. 14, at 50 (H.C., 1st Sess., 33rd Parlt., 1984-5). Keyes & Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Supply & Services Canada, 1977) at 57-59 also recommended such a right.

[35] R. Sarraute, "Current Theory on the Moral Right of Authors and Artists under French Law" (1968) 16 Am. J. Comp. L. 465 at 477; Strauss, "The Moral Right of the Author" (1960), Study #4 prepared for the Subcommittee on Patents, Trademarks and Copyright of the U.S. Senate Committee on the Judiciary (86th Cong., 1st Sess.) 109 at 122.

[36] *Cf.* D. Vaver, "Authors' Moral Rights in Canada" (1983) 14 IIC 329, at 353-54. The argument is that the opening words of s. 12(7) (*supra*, note 10), "Independently of the *author's* copyright, and even after the assignment ... of *the said copyright*," predicate a case where the author was the *original* owner of copyright. By s. 12(3), copyright ownership of employees' work vests in the employer, not the employee author.

Section 43 of the *Copyright Act* 1956 (U.K.), creating a tort of false attribution, extends to employees and ex-employees: *Crocker* v. *Papunya Tula Artists Pty Ltd* (1985), 61 A.L.R. 529 (Fed.Ct., Aust.) on equivalent Australian provision (Copyright Act 1968 (Cth.), s. 191). In France, moral rights theoretically accrue to an employee but in practice are normally assigned

However, the new section 12.1(2), proposed by the Bill permits authors freely to waive moral rights. In addition, the right of paternity, created by section 12.1(1), partly depends for its very existence on what is "reasonable in the circumstances." As we shall see, these circumscriptions may, when applied to the case of employees, be almost as pernicious as excluding employees altogether from their enjoyment.

The Report also recommended that corporations should enjoy moral rights[37] and that the definition of "employee" be extended to include certain independent freelancers.[38] The former recommendation has much to commend it. The latter, however, may take away existing moral rights protection from those who already have it. The *Government Response* to the Report did not accept the Report's view on extending the definition of employees, indicating that the question would be studied further. Bill C-60 does not change the current position dealing with copyright in employee works, nor does it explicitly extend moral rights protection to corporations. Although it seems likely that corporations will be able to assert a paternity right in those cases where they are deemed authors under the *Act*, corporations may arguably still be incapable of holding a right of integrity: does a corporation have an "honour or reputation" that can be prejudiced?

Although the Bill seemingly encompasses employees as beneficiaries of moral rights, it seems worthwhile to consider why this should be so as a matter of policy and why the Report was deficient in not expressly adopting this policy.

If corporations are to have moral rights, equal treatment demands that employees should also. Why should a co-author's employee status affect his or her right to be credited?[39] Why should

---

by contract to his/her employer: Colombet, *Propriété Littéraire et Artistique*, 2d ed. (Paris: Dalloz, 1980) para. 131.

[37] *Charter of Rights for Creators*, *supra*, note 8 at 13.

[38] *Ibid.* at 14.

[39] *Goulet*, *supra*, note 24.

the plaintiff in *Snow* v. *The Eaton Centre Ltd*[40] have failed if he had produced the sculpture as an employee? Had the Report been adopted at the time, the plaintiff could have fallen into the employee category as an "independent freelancer," and Snow's suit would have failed on this ground. How does such a result square with the public's interest in the integrity of its culture?

The Report's failure to deal with employees' moral rights, while making sure that corporations are adequately protected, is all the more surprising since evidence before the Subcommittee indicated that many industries customarily credit their employees' contributions.[41] Surely a Report claiming to be a *Charter of Rights for Creators* ought to have encouraged and strengthened these practices, rather that passing over them in silence. True, there may be difficulty in accommodating the right of integrity as between an employee and his or her superior in a corporation, as for example, a newspaper editor's right to edit a journalist's contribution.[42] Difficulties with particular cases simply mean that more time needs to be taken to find a satisfactory solution, not that a principle should be ignored or jettisoned because an exception is troublesome to formulate.

If, by its silence, the Report meant to affirm that employees should have no moral rights, this should be firmly opposed. An employee who is compelled to remain anonymous within an organization has information about his or her value suppressed, and the market is consequently unable to judge his or her worth. Other organizations willing to hire an able author from another organization may be unable to ascertain his or her identity easily; the current employer has every incentive to maintain the employee's

---

[40] *Supra*, note 26.

[41] Thus, a witness for the Canadian Daily Newspaper Publishers' Association testified that "most [newspapers], certainly my own, identify their photographers. I cannot imagine any paper having any quarrel with adopting that practice." *Supra*, note 34 at 14:30.

[42] Edna Buchanan, a Miami *Herald* crime reporter, is quoted as saying: "For sanity and survival, there are three cardinal rules in the newsroom: Never trust an editor, never trust an editor, and never trust an editor." "Profiles: covering the cops" *New Yorker* (17 February 1986) 39 at 40.

anonymity. The result is a systemic undervaluation of the creative employee's worth.

Interestingly enough, the patent system has long recognized the importance of an inventor's moral rights. Patents may generally be granted to the inventor's employer, but the inventor's name must be stated in the patent application, and must appear in the public documents once the patent is granted: naming the wrong inventor or inventors can invalidate the patent.[43] Patents registries thus serve as public data bases, exhibiting the pool of creative talent in particular fields, and establishing a potential market for this form of labour.

The importance of publicity as an element in the market value of labour was judicially recognized as early as the 1920s in *Hepworth Mfg. Co. Ltd* v. *Ryott*.[44] In this case, a contractual clause, requiring a film star to abandon his screen name upon leaving his studio's employ, was struck down as an unreasonable restraint of trade. The court was rightly considerably swayed by evidence graphically illustrating the value of having one's professional name known. The actor's original employer was willing to employ him at his original contract rate of £10 per week. The new employer was paying him £20. Without his professional name, his salary would have been £7 per week, until he was able to establish a new identity and goodwill. Plainly, if an employer is able to control the use of an employee's name, he or she can pay the employee below-market

---

[43] See, for example, *Patent Act*, R.S.C. 1970, c. P-4, s. 28(1); Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 1981) at 117.

[44] [1920] 1 Ch. 1 (C.A.). The tale of Lord Kenyon, too, must strike a responsive chord in the many young lawyers articling or working in modern law firms. As a young barrister working for a better-known colleague Dunning, Kenyon is said to have written for a pittance

> *many hundreds of opinions which Dunning had never read [and which] were copied from Kenyon's MS. by Dunning's clerk and signed by Dunning's hand.... It gradually oozed out in the profession that Dunning's opinions were written by Kenyon, and the attorneys thought they might as well go at once to the fountain-head, where they might have the same supply of pure law at much less cost.*

Lord Campbell, *The Lives of the Chief Justices of England* (London: J. Murray, 1874) vol. 3 at 9.

rates. The surplus value attached to the asset that the name represents is thus fully captured by the employer even though the employee has at least partly contributed to its value. This is inconsistent with the natural law principle of not "reaping where thou hast not sown and gathering where thou hast not strawed,"[45] which suggests that each person's economic return should be proportionate to his or her investment in money and labour expended in creating, maintaining, and enhancing an asset.

In the film industry, screen credit is "of the utmost concern" to those who live by publicity.[46] Public credit is equally important to creative people in many other industries. The result of not extending moral rights theory to employees is thus to perpetuate an unjust enrichment and indirect restraint of trade favouring current employers, and to withdraw from the market valuable information about creative people. This disadvantages creators, prospective new employers, and ultimately the public, which would benefit from an employee's talents being employed in their most efficient and highest valued use.

3. Works may be destroyed.

While recommending that the original of an artistic work not be modified, the Report says nothing about the work's destruction. The right of integrity provided in section 12(7) of the current *Act*

---

[45] Matthew XXV:24. This biblical precept may provide both a justification for the ascription of property rights in an intangible and also the ethical basis of the principle of unjust enrichment found in both common and civil law; see *Cie Immobilière Viger Ltée* v. *Lauréat Giguère Inc.* (1976), [1977] 2 S.C.R. 67 at 76-77; *Pettkus* v. *Becker* (1980), [1980] 2 S.C.R. 834 at 852, 117 D.L.R. (3d) 257 at 277; *White* v. *Central Trust Co.* (1984), 7 D.L.R.(4th) 236 at 245-246 (N.B.C.A.), La Forest J.A. ("a universal principle [of unjust enrichment] . .. affords an excellent opportunity for cross-fertilization between Canada's two legal systems"); *Sorochan* v. *Sorochan* (1986), [1986] 2 S.C.R. 38 at 43-46, 29 D.L.R.(4th) 1 at 4-7 (S.C.C.). See George B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) at 37 ff.

[46] B.F. Berman & S. Rosenthal, "Screen Credit and the Law" (1962) 9 U.C.L.A. L. Rev. 156 at 185. See also G. Youngman, "Negotiation of Personal Service Contracts" (1954) 42 Cal. L. Rev. 2 at 4.

may not include the right to prevent the owner of an original work from destroying it.[47]

The Report should have recommended that the author of any work has a right not to have the original of the work destroyed, at least without giving him or her an opportunity to reclaim it at his or her expense. The public's interest in preserving its cultural items is best served by such a provision. Exceptions could be made for works that are routine, such as internal office memoranda that may need to be shredded periodically, and could easily be drafted upon evidence being presented about any practical difficulties in implementing such a proposal. Alternatively, the matter could hinge on the author's manifested intent or presumed intent, in relation to certain works, not to have the works preserved indefinitely.

Bill C-60 does not take the matter any further. It does say in the proposed new section 18.2(3) that good faith steps to restore or preserve a work and certain other changes (in location or physical structure) will not in themselves constitute a "distortion, mutilation or other modification of the work." The retention of the latter formula, as well as the particular exemptions set out in section 18.2(3), seems to contemplate that destruction is still incapable of being a breach of moral rights. Thus, nothing explicit has been done to change the existing case law, that seems to permit complete destruction, even of an original artistic work.

4. Moral rights are not perpetual.

The Report recommends that moral rights last only as long as the work's copyright. It thus implicitly rejects the view held in

---

[47] *Gnass* v. *La Cité d'Alma* (1977), 09-000032-745 (C.A.); but see *contra*, E. Colas, "Le Droit Moral de l'Artiste sur Son Oeuvre" (1981) 59 Can. Bar Rev. 521. If the work is lent rather than sold, the borrower obviously cannot destroy or mutilate it; indeed, he may be obliged to take reasonable measures to preserve it, or to notify the lender of its deterioration so that the latter may take such measures. Breach of these obligations may entitle the lender to damages: *Gnass* v. *Ville de Montréal*, [1974] C.S. 414; *Roussil* v. *Ville de Montréal* (1982) Montréal 500-05-003751-771 (S.C.), Bard J.

For a recent French case where a sculptor recovered damages against the destroyers of an allegedly irreligious work, see *Bezombes* v. *L'Huillier*, [1982] Eur. Com. Cas. 7 (C.d'A., Paris).

many countries that such rights should be perpetual.[48] Section 21 of Bill C-60 implements the Report's recommendation. Why should the owners of the original of public domain works have the right to bowdlerize or mutilate them? The *Government Response* recognized this problem: it agreed in principle with the Report's recommendation that written submissions to Parliament, legislatures or public bodies of inquiry should be in the public domain, but indicated that moral rights protection may still be needed for such material.[49] Regrettably, the Response did not recognize the broader logic underlying its concern, *viz.*, that public domain works generally need moral rights protection. A country's culture is not measured by the life of an author plus fifty years. Passage of time intensifies the need to preserve the authenticity of work. The right could be administered by the author's heirs or by some body dedicated to the continuation of the country's culture, as is currently the practice in France.

Even if the duration of moral rights were not perpetual but only coterminous with copyright, a provision entitling some organization to monitor moral rights of public domain works could have been proposed, as some countries espousing a limited term for moral rights have enacted.[50] The Report does not propose this, nor does it suggest that there is any alternative to its views. Bill C-60 is equally silent on this point.

---

[48] For example, France: *Loi du 11 mars 1957 sur la propriété littéraire et artistique*, Art. 6(1). Accord: Ladas, *op.cit.*, *supra*, note 13 at 602; Michaelidès-Nouaros, "Protection of the Author's Moral Interests after his Death as a Cultural Postulate" [1979] Copyright 35.

[49] *Supra*, note 32 at 3.

[50] For example, Sweden: see S. Stromholm, "Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint" (1983) 14 IIC 1 at 38ff.

5. Moral rights may be assigned or waived.

The Report recommends that moral rights should be freely assignable and waivable.[51] Any other view would be "paternalism:" "[c]oncerns expressed that hard-pressed and non-established creators may be tempted to give away too much control over their works are well meant, but lead to undesirable constraints."[52] Just what these "undesirable constraints" are, is not stated. This proposal is the most objectionable of the Report's recommendations on moral rights. It suggests that an apter title for the Report would have been either *A Charter of Rights for Sale* or *A Barter of Rights for Creators.*

Bill C-60 does not go quite this far. In section 12.1(2), it states that moral rights may not be assigned but may be waived by the author. Under subsections (3) and (4), an assignment of copyright is not in itself a waiver of moral rights. However, waivers in favour of owners or licensees may be invoked by persons authorized by the owner or licensee to use the work unless the contrary is indicated in the waiver.

The principal objections to the Report's proposal and the provisions of the Bill are:

a) *The Report's claim that it was "enhancing" moral rights is unjustified in the light of its recommendations.*

I have argued elsewhere that, as a matter of statutory construction, people may be unable to contract out of the rights presently granted under section 12(7) of the *Copyright Act*, except where a particular contract is consistent with that provision's policy. This policy seems to be, first, to redress the frequently unequal bargaining power and ability of creative persons when dealing with media entrepreneurs and, second, to protect the public interest in

---

[51] *Charter of Rights for Creators, supra*, note 8 at 7-8. For the *Government Response* to this proposal, see text accompanying notes 80ff., *infra.*

[52] *Ibid.* at 7.

the integrity of its culture.[53] The case law is consistent with this view.[54] What the Report does, in fact, is to discard the current policy bases of section 12(7) and say that there is no public interest in protecting creative people against improvident bargains or in preserving the public culture: the public interest is equated with private interests and may be traded like any other commodity. This runs directly counter to both federal and provincial policies designed to maintain and enhance this country's heritage. Bill C-60 does not depart from the Report's position in this respect.

b) *Equating moral rights with economic rights is wrong.*

The Report expressly equates moral rights with economic rights: "all copyright rights – economic as well as moral – should be assignable or waivable."[55] This statement exposes a basic misunderstanding of the whole doctrine of moral rights, quite apart from the position under section 12(7). The Report's view was not held even during the unbridled laissez-faire period prevailing in Canada and the United States at the turn of the century. In considering whether an author was entitled under an informal publishing contract to have a manuscript published under his name rather than anonymously, a New York judge said in 1910:

> Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork.... The position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name, or to perform before the public, necessarily affects his reputation and standing, and thus impairs or increases his future earning capacity.[56]

---

[53] Vaver, *supra*, note 36 at 349-52; Vaver, *supra,* note 28 at 94-97.

[54] For example, *John Maryon International Ltd* v. *New Brunswick Telephone Co. Ltd* (1982), 141 D.L.R.(3d) 193 at 246-49 (N.B.C.A.); *ADI Ltd* v. *Destein* (1982), 141 D.L.R. (3d) 370 (N.B.Q.B.); *Kerr* v. *The Queen* (1982), 66 C.P.R. (2d) 165 at 170 (Fed. T.D.).

[55] *Charter of Rights for Creators, supra*, note 8 at 7.

[56] *Clemens* v. *Press Pub. Co.* (1910), 122 N.Y.S. 206 at 207-208, Seabury J. (concurring).

In Canada, Fitzpatrick C.J.C. said much the same thing the following year when deciding that an author was entitled to the return of his manuscript upon his publisher's refusal to publish it:

> I cannot agree that the sale of a manuscript of a book is subject to the same rules as the sale of any other article of commerce, *e.g.*, paper, grain or lumber. The vendor of such things loses all dominion over them once the contract is executed and the purchaser may deal with the thing which he has purchased as he chooses. It is his to keep, to alienate or to destroy. But it will not be contended that the publisher who bought the manuscript of "The Life of Gladstone," by Morley, or of Cromwell by the same author, might publish the manuscript, having paid the author his price, with such emendations or additions as might perchance suit his political or religious views and give them to the world as those of one of the foremost publicists of our day. Nor could the author be denied by the publisher the right to make corrections, in dates or otherwise, if such corrections were found to be necessary for historical accuracy; nor could the manuscript be published in the name of another. After the author has parted with his pecuniary interest in the manuscript, he retains a species of personal or moral right in the product of his brain.[57]

The right of an inventor to be named when a patent grant issues cannot be waived or assigned; indeed, even an inadvertent misnomer is grounds for invalidating a patent.[58] Why any different view should be held for the author of a copyright work is unexplained.

Bill C-60 recognizes this point in part by preventing the assignment of moral rights. Allowing an unfettered power to waive moral rights, however, seems to rest on the same basic fallacy as that adopted by the Report.

c) *The recommendation may be inconsistent with the Berne Convention.*

The Report's proposal to permit assignments of moral rights may be contrary to Canada's international obligations under Article *6bis*(1) of the 1928 *Rome Revision of the Berne International*

---

[57] *Morang & Co.* v. *Le Sueur*, *supra*, note 12 at 97. This was well before the enactment of s. 12(7) by the *Copyright Amendment Act* 1931 (Can.).

See too *Robinson* v. *Graves* (1935), [1935] 1 K.B. 579 (C.A.) (contract for commissioned portrait is contract for skill and labour, not sale of goods); *cf. Deta Nominees Pty. Ltd* v. *Viscount Plastic Products Pty. Ltd*, [1979] V.R. 167 (S.C.).

[58] Falconer, Aldous & Young eds, *Terrell on the Law of Patents*, 12th ed. (London: Sweet & Maxwell, 1971) para. 90; see generally *ibid.* paras. 76ff.

Convention for the Protection of Literary and Artistic Works, which requires moral rights to be protected "même après la cession [des droits patrimoniaux d'auteur]." Article 6*bis*(2) gives Canada the right to determine the conditions under which these rights may be exercised and the remedies available for their protection. This does not suggest that Canada may change their character by making them assignable.

Professor Nimmer took a different view of the effect of Article 6*bis*. In his opinion Art. 6*bis*(1) did not "expressly" hold moral rights to be inalienable. Nimmer claimed that, literally construed, the provision meant only that a transfer of economic rights did not in and of itself transfer moral rights.[59] Quite apart from the fact that treaties, like statutes, should generally not be construed literally but purposively, the materials cited by Nimmer do not support his broad claim. They do support the proposition that the exercise of moral rights may be regulated by agreement, but not that the moral rights may be assigned nor that they may be totally renounced (functionally as prejudicial to the author as total assignment).

At the 1928 Rome Conference on the Berne Convention, at which Article 6*bis* was first introduced, both the Sub-Committee recommending the text of the provision as it was finally passed and the Reporter to the Conference, Piola Caselli, explicitly stated that the moral rights established by the Article were inalienable.[60] Caselli

---

[59] M.B. Nimmer, "Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law" (1967) 19 Stanford L.R. 499 at 524. Recht, *Le Droit d'Auteur en Belgique* (Bruxelles: F. Larcier, 1955) at 74 agrees, after having earlier inconsistently said at 71: "Assurément, il touche à ce que la personne humaine a de plus essentiel, à la dignité, à la gloire, à quelque chose *qui n'est pas susceptible de trafic*" (my emphasis).

[60] International Union for the Protection of Literary and Artistic Works, *Proceedings of the Conference held at Rome from May 7, to June 2, 1928*, at 181 (Eng. translation by Pierre Tisseyre) ("From now on it is clear that the creator of a literary or artistic work retains on the product of his thoughts, rights which are above and outside of the conventions of alienation. These rights which are called 'moral rights' in the absence of a better expression, are distinct of the patrimonial rights and the cession of the latter do[es] not affect them") (Sub-Committee Report); at 203 (Art. 6*bis*(1) "affirms its [*sc.*, the moral right's] specific character, its essential character which *inhaeret personae* and which therefore is inalienable"; "in the same way as [the paternity right] is not alienable, it cannot be renounced") (Reporter's Report).

later claimed that the Article was not intended to affect contractual rights, but nonetheless continued to insist that Article *6bis* implicitly ensured that moral rights, being personal, could not be assigned. Caselli distinguished between attempts to *transfer* the right (*cessions* or assignments), which were inherently impossible, and contractual *regulation* of the right, which was permitted. On the other hand, he thought that the validity of a clause completely renouncing for the future all moral rights was suspect.[61]

An attempt at the 1948 Brussels Conference on the Revision of the Berne Convention to make cession *explicitly* impossible failed. Some countries, notably Britain, were reluctant to countenance any significant expansion of the moral rights concept, partly because they feared that this would make it difficult for the United States eventually to join the Berne Convention.[62] This inaction in 1948 does not change the position under the 1928 and subsequent versions of the Convention. The nature of moral rights that the Convention mandates, suggests that assignments are *implicitly* prohibited and that, while contracts regulating the exercise of moral rights for a particular transaction may be valid, states may be compelled to hold total waivers of such rights void as incompatible with the policy of Article *6bis*.

To the extent that it departs from the Report by forbidding assignment, Bill C-60 adheres to the literal injunction of Article *6bis*. By allowing unlimited waivers, however, Bill C-60 arguably violates the spirit of that Article.

d) *The recommendations are inconsistent with the personal nature of moral rights.*

By permitting the assignment of moral rights, the Report has implicitly discarded the long accepted notion that such rights are personal, not proprietary. On the one hand, this opens up the

---

[61] Caselli, "Correspondance – A propos de l'article *6bis* de la Convention de Berne revisée" [1940] Le Droit d'Auteur 66 at 68. Others have agreed; for example, van Isacker, "Letter from Belgium" [1967] Copyright 135 at 138.

[62] *Documents de la Conférence Réunie à Bruxelles du 5 au 26 juin 1948* (Berne, 1951) at 184-97.

possibility of an author assigning his or her copyright to one person and his or her moral rights to another; indeed, there seems to be no reason why the moral rights cannot be subdivided into their components, territorially or temporally, and assigned with or without accompanying economic rights to any number of people. What policy this furthers is unexplained.[63] On the other hand, since the Report has not explicitly changed the character of moral rights, they may still continue to be classified as personal at common law. Whole or partial assignments might then be held void at common law: the sale of personal torts is void under the principles of champerty and maintenance.[64] Moreover, assignments by which the assignees of paternity rights are entitled to attribute authorship to someone other than the true author would seem to be void as contracts tending to the promotion of public deception. A trap for the unwary may well have been created.

Even if it is assumed that such assignments are permissible at common law, the Report does not explain their intended effect. Will the assignment create in the assignee new moral rights measured by his or her interests, rather than those of the assignor? Or will the assignee merely be able to assert the assignor's rights vicariously? In the latter case, where the assignor's and assignee's interests diverge, the assignee will have no incentive to assert the assignor's interests. Perhaps, problems such as these caused the common law to prohibit assignments of personal torts: how does the assignee of another's right of action for defamation practically assert

---

[63] A limited concept of assignment may be needed to permit moral rights to be transferred from one corporation to another on a merger or reorganization (see *Brief sumbitted to the Standing Committee, supra*, note 8 by the Joint Copyright Legislation Committee of the Patent & Trademark Institute of Canada and the Canadian Bar Association (1985) at 72), or to allow descent to the author's heirs or other testamentary beneficiaries (Keyes & Brunet, *supra*, note 34 at 59). These special situations however do not make the case for moral rights to be generally assignable.

[64] *Beloff* v. *Pressdram Ltd*, [1973] 1 All E.R. 241 at 254 (Ch.). See too *Union Carbide Can. Ltd* v. *Trans-Canadian Feeds Ltd* (1965), 32 Fox P.C. 17 at 33-34 (Exch.): cause of action for past patent infringements cannot be assigned at common law even with patent, though position under civil law may be different.

Significantly, the U.K. Green Paper on Reform of the Law relating to Copyright, Designs and Performers' Protection (reprinted at (1981) 28 Bull.Cop. Soc. 570 at 628) states that moral rights should not be assignable.

the right? No doubt similar concerns motivated civilian legal systems to treat moral rights as uncedable. Fortunately, Bill C-60 corrects this gap in the Report's understanding and expressly forbids assignment or cession of moral rights.

e) *Making moral rights freely assignable and waivable will in practice eliminate them entirely.*

The Report's stand in favour of "freedom of contract" and against "paternalism" is totally misplaced and is the most mischievous of its recommendations. It sounds the death-knell for virtually all moral rights in Canada. This naive support of freedom of contract fails to recognize that perhaps as many as 90 percent of all contracts today are standard form *contrats d'adhésion.*[65] Except in the relatively few instances where creative people have formed associations that have then bargained from a position of equality with the corporate consumers of their product, creative people have had little input into these contracts. There was certainly plenty of evidence before the Subcommittee indicating that Canadian creators need protection when contracting with entrepreneurs.[66] The contracts are typically drafted by the corporate consumers themselves. Not surprisingly, the latters' interests have been

---

[65] Slawson makes this claim in respect of the U.S.: "Standard Form Contracts and the Democratic Control of Lawmaking Power" (1971) 84 Harv. L.R. 529. The position in Canada seems no different.

[66] *Minutes of Proceedings and Evidence, supra,* note 34 at 15:16 (Canadian Artists' Representation (National)); 15:71-2 (L'Association des Photographes professionels du Québec); 15:88 ff. (Canadian Association of Professional Dance Organizations); 21:32 (Alliance of Canadian Television and Radio Artists, Copyright Writers). See too Gouvernement du Québec, *To Give Talent Its Due: Improving the Socio-Economic Status of Québec's Creative Artists* (1980) at 113 ff., 119-21. A similar position exists in EEC countries (see Dietz, *Copyright Law in the European Community* (1978, Sihthoff & Noordhoff) at 190 ff.) and in Australia (Catterns, "Artists' Moral Rights in Australian Law," in Australian Copyright Council, *National Symposium on Moral Rights: Report of Proceedings* (1980) 28 at 48; the discussion at 50 ff. gives many practical examples of moral rights breaches in daily Australian cultural life).

preferred to those of the creator.[67] No corporate consumer has ever claimed that a creator had taken unfair advantage of it in negotiating an exploitation contract; all suits making this allegation, sometimes successfully, have been by creators against their managers or corporate consumers.

The future treatment of moral rights in Canada can be predicted by looking at a typical clause in a current U.S. contract dealing with the sale of motion picture rights in a book:

> *Alterations.* In producing Motion Pictures hereunder, the Purchaser shall have the right to make such changes in, additions to and eliminations from, the Novel and to include in the Motion Pictures such language, song, music, choreography, characters, plot, incidents and situations as it in its sole discretion may deem advisable. The Owner shall not institute or maintain any action on the ground that the Motion Pictures constitute an infringement of his "droit moral," or a reflection on his professional reputation.[68]

---

[67] See Lewis, "Working Groups Copyright" (1982) 10 Int. Bus. Lawyer 49 at 50:

> The one essential of the droit moral [in France] is that it cannot be affected by contract. The proposal in the British green paper [*supra*, note 64] to adopt a kind of watered down droit moral, but to allow authors to opt out of it by contract totally destroys the basic conception of droit moral. It is there to protect the authors against the all powerful users of their works – the film studios, the television stations, the radio stations and book publishers. It is of its essence part of an author's basic personality like his liberty and something with which he cannot part by agreement.

Accord: A.S. Katz, "The Doctrine of Moral Right and American Copyright Law: A Proposal" (1952) Fourth ASCAP Copyright Law Symposium 79 at 125-29.

On the issue of how contracts waiving moral rights are likely to be drafted, an American practising lawyer turned professor gives this frank description of how he used to draft contracts for a client bank:

> To the best of my recollection, no one in any of the corporations or in the law firm ever suggested that the forms should be drafted other than as one-sidedly in the interests of the corporate client as possible. Nor did anyone ever report a customer or other business firm with which any of the corporations had dealt as objecting to anything in any of the forms or wanting to change them. In no case in which special arrangements were made with a very large buyer or borrower were the favorable terms extended to other dealings of the same kind.

W.D. Slawson, "The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms" (1984) 46 U. Pitt. L. Rev. 21 at 44.

[68] *Lindey on Entertainment, Publishing and the Arts* (1985, 2d ed.), vol. 2, 802 at 806. Similar clauses in Australian contracts are set out by Catterns, *supra*, note 66 at 47.

Even some law reviews cannot refrain from trying to nibble away at moral rights. The New York University Journal of International Law & Politics contains in a so-called "Author's Agreement" at the front of its numbers (see, *e.g.*, (1985) vol. 17, no. 4) the following provision: "... once the Article has been assigned to the *Journal* staff for citation and substance editing,

A clause like this has been around in the U.S. motion picture industry for decades, and the U.S. is not even a jurisdiction that recognizes any general theory of moral rights![69] A writer who signed a contract containing an even more formidable clause with Twentieth Century Fox was held to have relinquished her rights to any screen credit and control over her script.[70]

This seems to be the likely fate of moral rights in Canada in the vast majority of creative and exploitation contracts. The only exceptions will be where the author is sufficiently successful to have bargaining power and is adroit enough to use it, or where a powerful guild has managed to negotiate an unalterable standard form of contract preserving the moral rights on behalf of its members.

Against this, it may be argued that Canadian courts have ample powers to police unfair contracts through various common law doctrines such as unconscionability, fraud, undue influence, or

---

Author is committed to publishing the Article with the *Journal*, but may request that his/her name(s) be deleted from the final product." This obviously seeks to short-circuit decisions such as *Joseph* v. *National Magazine Co. Ltd*, [1959] Ch. 14.

[69] See, for example, *Gilliam* v. *A.B.C.*, *supra*, note 1; *Granz* v. *Harris* (1952), 198 F.2d 585 at 590.

[70] *Harris* v. *Twentieth Century Fox Film Corp.* (1943), 139 F.2d 571 aff'ing in part (1942), 43 F.Supp. 119. The clause, which appears in Berman & Rosenthal, *supra*, note 46 at 161 (n. 17), reads:

> We shall be entitled to and shall solely and exclusively own, in addition to your services, all of the results and proceeds thereof (including, but not limited to, all rights throughout the world of production, manufacture ... and radio broadcasting and of copyright, trademark and patent) whether such results and proceeds consist of literary, dramatic, musical, motion picture, mechanical or any other form of works, themes, ideas, compositions, creations or productions, *together with the rights generally known in the field of literary and musical endeavor as the moral rights of authors in and/or to any musical and/or literary proceeds of your services, including but not limited to, the rights to add to, subtract from, arrange, revise, adapt, rearrange, make variations of said property,* and to translate the same into any and all languages, *change the sequence, change the characters and the descriptions thereof contained in said property, change the title of the same, use said title or any of its components* in connection with works or motion pictures wholly or partially independent of said property, and to use all or any part of said property in new versions, adaptations, and sequels in any and all languages, and to obtain copyright therein throughout the world; *and you do hereby assign and transfer to us all of the foregoing without reservation, condition or limitation, and no right of any kind nature or description is reserved by you...* [Emphasis added].

restraint of trade.[71] In some cases such powers have been exercised in England with respect to acting, composing, and recording contracts.[72]

The problem with these doctrines, however, is that their application is extremely uncertain[73] and depends upon a "meticulous examination of the facts" of each case.[74] The doctrines also have peculiarities that may defeat or thwart otherwise meritorious claims. For example, under the restraint of trade doctrine, a contract is unenforceable *de futuro*, not void *ab initio*; copyrights transferred under it continue to be held by the assignee, unless the plaintiff can also show that the contract should be rescinded for unconscionability,

---

[71] I am not competent to speak on the position under Québec law, but I note that the Supreme Court of Canada has considered that common law principles on restraint of trade doctrine may be equated with those applying in Québec under the provisions relating to contracts "contraire à l'ordre public:" *Cameron* v. *Can. Factors Corp. Ltd* (1970), [1971] S.C.R. 148 at 162ff., 18 D.L.R. (3d) 574, Laskin J.

[72] *Hepworth Mfg. Co. Ltd* v. *Ryott, supra*, note 44; *Macauley* v. *Schroeder Publishing Co.*, [1974] 1 W.L.R. 1308 (H.L.); *Clifford Davis Management Ltd* v. *W.E.A. Records Ltd*, [1975] 1 W.L.R. 61 (C.A.); *O'Sullivan* v. *Management Agency & Music Ltd*, [1984] 3 W.L.R. 448 (C.A.); *Armatrading* v. *Stone* (1984, Q.B.D., unreported), noted in (1985) 13 Bus. L. Rev. 326.

[73] Hasson, "Unconscionability in Contract Law and in the New Sales Act – Confessions of a Doubting Thomas" in Ziegel, ed., *Papers and Comments delivered at the Ninth Annual Workshop on Commercial and Consumer Law* (1981), 59; *cf.* Reiter, *ibid.* at 77. A recent case rejecting unconscionability, unreasonableness and public policy arguments for invalidating a contractual waiver, *Dyck v Manitoba Snowmobile Association Inc.* (1985), [1985] 1 S.C.R. 589, 18 D.L.R.(4th) 635 (S.C.C.), is the subject of extensive examination in D. Vaver, "Developments in Contract Law: The 1984-85 Term" (1986) 8 Sup. Ct. L. Rev. 109 at 161, where it is concluded that the Court's current treatment of unconscionability and, for that matter, defences of unreasonableness or public policy, "holds out little prospect that the plea is destined to occupy anything other than a marginal role in contract law." Accord: Leff, "Thomist Unconscionability" in Ziegel, ed., at 96: "unconscionability ... plays so slim a role in actual adjudications."

While recommending the statutory enactment of a doctrine of unconscionability, the Ontario Law Reform Commission in its 1987 *Report on Amendment of the Law of Contract* admitted that "the doctrine has not yet been clearly recognized by the Supreme Court of Canada, nor has it been uniformly applied by lower courts." (*ibid.* at 127).

[74] *National Westminster Bank plc* v. *Morgan*, [1985] 1 All E.R. 821 at 831 (H.L.).

fraud, or undue influence.[75] Even then, these latter pleas can be defeated by equitable defences such as delay.[76]

Lawsuits claiming that a contract is unfair are therefore extremely complicated, time-consuming and expensive.[77] Corporations defending them typically have a deeper pocket than the individual author; they also have every incentive to "show their muscle" and fight even an unmeritorious case through to the highest court in order not only to wear out this plaintiff but also to deter other potential plaintiffs under contract to them from pursuing similar actions. The fight may be waged all the more fiercely because these doctrines, if successfully pursued, can result not merely in a single *clause*, being held unenforceable but in the whole *contract* and the investment under it being terminated.

The presence of the various doctrines for invalidating unfair contracts at common law thus does little to influence behaviour in the real world of commerce. The principles have existed for a long time; yet clauses that would likely be held unenforceable after a costly and harrowing trial still commonly appear in current agreements. Corporations inserting them rely on their *in terrorem* character and are aware that authors, with or without the benefit of legal advice, are practically unable to challenge them.

Moreover, at the time many contracts are signed, the nature and extent of a work's future exploitation may be unknown; authors unwilling to make a fuss over a waiver of moral rights clause, when its implications seem largely hypothetical, come to rue their decision only later when the exploitation rights become valuable. Many entrepreneurs know and take advantage of this fact. It should surely be recognized that copyright is not "a game of chess in which the public can be checkmated."[78] Nor should modern legislation allow

---

[75] *O'Sullivan* v. *Management Agency & Music Ltd*, *supra*, note 72 at 456.

[76] *Elton John et al.* v. *Dick James Music* (1985, Q.B.D.), noted in *Variety*, 4 December 1985, 104.

[77] The Elton John trial against his manager took 50 days. See *ibid.* The legal costs for the successful plaintiffs, even without any appeal, must have been enormous.

[78] *Morrissey* v. *Procter & Gamble Co.* (1967), 379 F.2d 675.

the history of Modigliani to be repeated, where the artist's family lived in poverty while his dealers dined at Maxim's.[79]

f) *How moral rights should be regulated.*

If the Report's view that moral rights are as important to creators as economic rights is accepted, the conclusion that they should be freely saleable as economic rights should not follow. The transfer of economic rights may provide the entrepreneur with the necessary incentive to exploit the author's work for their mutual profit. However, why moral rights should be freely waivable or assignable *in all cases* has not been demonstrated.

The *Government Response* to the Report recognizes that some modification of the Report's proposal is necessary "so as to protect creators from abuse."[80] The solution the Response proposes, "to limit the term of licences and of the assignment," is, however, inadequate to meet the abuses detailed above. How such a term would be calculated is not stated. Presumably, section 12(5) of the current *Act*, providing for the reversion of interest in copyright grants, is not the model the Response had in mind: a term of twenty-five years after the author's death before the interest reverts is worthless to creators. In any event, the principal abuse to be counteracted is the routine waiver of moral rights occurring in an unbargained, and practically unbargainable, standard form contract. To say that the waiver is effective for five, ten, twenty-five or whatever period of years the legislation may stipulate is to legitimize the abuse but to say it can only continue for an arbitrary period. The waiver clauses set out above[81] are objectionable in principle, whatever time limit is statutorily put on their operation.

Significantly, Bill C-60 includes no provision seeking "to limit the term of licences ... so as to protect creators from abuse." Unless

---

[79] Lewis, *supra*, note 67.

[80] *Government Response*, *supra*, note 32 at 2.

[81] See accompanying text, *supra*, note 67; also, *supra*, note 69.

these provisions are slated to appear in a later phase of the copyright revision process, the Government has in Bill C-60 retreated from the position set out in its Response. It has returned to the Report's laissez-faire position. It has not even suggested that the rights need be *expressly* waived; a waiver may be implied from the circumstances, just as courts now imply a licence to use copyright. Moreover, the Bill makes no attempt to link this power to waive with the current reversion provisions of section 12(5) of the *Act*. Thus, an author's estate to which copyright has reverted after the twenty-five year *post mortem* period mandated by section 12(5) may, for some not readily apparent reason, be unable to assert any of the moral rights that the author waived for the entire term of the copyright.

The dilution of moral rights goes even further than the Report recommended. The right of paternity, including the right to be associated with the work under a pseudonym, is, by section 12.1(1), assertible only "where reasonable in the circumstances." Presumably, this provision was intended to appease interests such as broadcasters, who might find it inconvenient to mention expressly the various authors of a broadcast work unless the work itself incorporated the authors' names, such as a film containing the credits at its beginning or end.[82] But the Bill provision goes further. It may not be "reasonable in the circumstances" for a ghost-writer to have any right of credit that can be sold through relinquishment by waiver; nor for an employee or a team of employees to be named as the author or authors of a work created in the course of employment; nor for a writer to remain pseudonymous if the publisher decides that it would now be more advantageous to issue a work in the writer's real name; nor, contrariwise, for a writer's name to continue in relation to a work where the publisher decides it would be more advantageous for the work to be issued under a pseudonym. To make the *existence* of a right depend on the, at best, amorphous and, at worst, circular concept of whether or not it is reasonable for the right to exist is, in the field of copyright, extraordinary.

---

[82] *Charter of Rights for Creators*, *supra*, note 8 at 62 (Recommendation 81).

A number of solutions are possible to remedy the deficiencies revealed by the Report and the Bill:

(1) Consistently with the philosophy that moral rights should not be treated as commodities, waivers could be banned completely. Authors would then have a complete veto over the way in which their works were publicly perceived.

Absolutely prohibiting waivers would, however, not be costless. The market price of works would marginally fall, since a work the adaptation of which is subject to an author's absolute veto is obviously worth less to an exploiter than one which is freely adaptable without the possibility of third party intervention. There would also be social costs: the derivative work might not become available to a wider audience; "black markets," using other means of reward to counteract authors' vetoes, might arise to avoid or blunt the impact of the prohibition.

(2) Waivers could be permitted, with the monitoring of undesirable encroachments on such rights entrusted to a body representing predominantly author interests. This could, perhaps, be modelled on the Public Lending Right Commission, which operates under the aegis of the Canada Council and is also funded by the Department of Communications. This would recognize the public interest in moral rights and the author's relative inability to vindicate them adequately by means of the conventional legal process. The body might give advance rulings on the acceptability of particular waivers, lay down general guidelines, and provide legal aid to authors wishing to challenge non-compliant waivers. The arguments against such a solution are obvious. They flow from political premises disfavouring government intervention in what is often seen as a private contracting matter and the public expense attendant on such intrusion.

(3) Another possibility, drawing and expanding on the *Government Response* in respect of moral "synchronization" rights,[83] is to tolerate waivers in favour of author collectives where the

---

[83] *Government Response, supra*, note 32.

collective is shown to have established an adequate mechanism to monitor moral rights on the assignor's behalf in accordance with his or her wishes. This, however, would be only a partial solution: it would leave untouched the areas where private, rather than collective, contracting is the norm.

(4) The terms of standard forms of exploitation contracts might be prescribed by legislation, as occurs in some countries and as Québec once proposed.[84] Whether such legislation could be constitutionally enacted by the federal government is debatable; and if provincial co-operation were required, the difficulties involved in persuading the provinces of the magnitude of the problem and getting substantial agreement on the solution seem practically insurmountable. Legislation along these lines in other jurisdictions has not been a total success story. Moreover, the rapidity of technological change, coupled with the slowness of legislative response, suggests that this solution may prove too inflexible and cumbersome.

(5) Perhaps the most modest – and feasible – proposal is to permit the waiver of moral rights *in some cases*, for example, where a work is transposed to another medium such as a novel into a film. Such a model, using the current judicial process and building on established copyright principles, may provide a solution free of the objections that might be marshalled against the other proposals suggested. For example, the current *Copyright Act* recognizes that a work put on a sound record pursuant to a compulsory licence may be subjected to "such alterations or omissions [as] are reasonably necessary for the adaptation of the work" to the record.[85] A quali-

---

[84] See Gouvernement du Québec, *supra*, note 66 at 119-21; Dietz, *supra*, note 66.

[85] Section 19(2); see W.J. Braithwaite, "From *Revolution* to *Constitution*: Copyright, Compulsory Licences and the Parodied Song" (1984) 18 U.B.C. L. Rev. 35. A similar but more elaborate provision exists in the U.S. Copyright Act 1976, 17 U.S.C. s. 115(a)(2); see M. Berg, "Moral Rights and the Compulsory License for Phonorecords" (1979) 46 Brooklyn L. Rev. 67. Section 7 of Bill C-60 would altogether repeal the present s. 19 providing for compulsory licences for sound recordings: see generally, Plante, "The Compulsory Mechanical Reproduction Licence in Canada", (1987) 3 I.P.J. 161.

fied power to waive moral rights along these lines (without the compulsory licence feature) seems justifiable in a new *Act.*

This proposal differs from the model in Bill C-60 in respect of paternity rights, where the very existence of the right depends upon a prior question of reasonableness. Under my proposal, the existence of the right to waive would be conceded. Only the *exercise* of such a right would be regulated by the touchstone of reasonableness. My proposal would not give absolute rights to either party, that is, to the author an absolute right of veto or to the exploiter an absolute right to disregard the author entirely. Instead, a sort of "fair dealing" balance of rights would be established: the exploiter could modify or credit the work in a way that was necessary for its exploitation, but the changes would be judged objectively according to the exigencies of the particular enterprise and the type of exploitation. This recognizes the flexibility needed to exploit copyright work, while at the same time wonderfully concentrating the minds of the exploiters on the need to consider the continuing interests and wishes of the originator with some respect. It would help protect the author in a frequent class of moral rights disputes where the management or policies of the entrepreneur corporation have changed, since the formation of the contract, and informal assurances that the author has received and relied on concerning the way in which the work would be exploited are peremptorily disregarded.[86] In negotiations, it would create

---

The Whitford Committee, *supra*, note 20, similarly recommended that "'reasonable' modifications" of a work should be allowed and that moral rights "can in appropriate cases be waived": para. 56. It supported the similar philosophy underlying the revised Netherlands Copyright Law, Art. 25: para. 55. The most recent U.K. White Paper has stepped back from a theory of limited waiver: it would allow authors to waive moral rights, omitting any qualification about "in appropriate cases"; in any event, authors, while having a right to claim authorship and to object to distortion, will be unable to object to "modification of a work to which they could not reasonably refuse consent": Department of Trade and Industry, *Intellectual Property and Innovation* (Cmnd. 9712, 1986) 73. See generally, Dworkin, "Moral Rights in English Law – The Shape of Rights to Come" [1986] 8 E.I.P.R. 329 at 330, 332-33.

[86] Thus, the studio's change of mind concerning the ending of the film "Brazil" (see *supra*, note 2) seems to have been prompted by a change of management with different views about what sort of film would "sell" to the public. See also *Frisby* v. *B.B.C.* (*supra*, note 27 at 111-12), where assurances, not amounting to collateral promises, made by the defendant's manager to the author about the integrity of the script – in particular, some lines containing sexual innuendo – were later disregarded by the former's more puritanical successor.

incentives for entrepreneurs to treat the author differently from a producer of pork bellies, who has no further interest in his product other than the money to be realized from immediate sale. It would simultaneously assist in protecting exploiters against super-sensitive authors who make unreasonable claims or in adopting unreasonable negotiating stances.

It is important to recognize that many authors sufficiently aggrieved by a perceived assault on their moral rights have gone and will, despite all odds, continue to go to law to vindicate their position. A wide range of possible causes of action, apart from any provided by the *Copyright Act* is available to creative counsel representing them.[87] A sensible remedy provided by the *Copyright Act* would tend to channel these disputes away from inappropriate causes of action based on invalidating "unfair" contracts and on torts such as defamation, passing off or injurious falsehood. All these causes have their own idiosyncrasies and represent costly over-reactions to the real grievance between the parties. If a dispute arose under the regime I have suggested, the issue would be refocused from the wide-ranging inquiries mandated by such common-law actions to some more pertinent question like: having regard to the purpose of the exploitation, is the modifier's work compatible with the initial creator's rights or paternity of integrity? The parties' relationship and their investment will more likely be preserved upon the resolution of the dispute, instead of running the risk of being entirely destroyed if a costly common-law action is waged.

Admittedly, in dealing with the suggested issue a court might be required to exercise some aesthetic or literary judgment, a task for which judges are not particularly equipped by training, predilection or experience. However, a court could have expert evidence on the issue presented to it which it could weigh judicially, just as it already does in deciding whether changes to a work "would

---

[87] Vaver, *supra*, note 36 at 331-40, 368-69.

be prejudicial to [an author's] honour or reputation."[88] The risk of aberrant decision here does not seem any greater than in any other sort of case involving judicial supervision of transactions.

III. CONCLUSION

Among the five grand objectives that *A Charter of Rights for Creators* set out to attain were the following:

> 1. Give more emphasis and reward to creative activity;
> 2. Clarify and extend moral rights;
> ...
> 5. Recognize the major importance of cultural enterprises.[89]

The Subcommittee thus saw its proposal on moral rights as one of its most important goals. Similarly, the Ministers' letter accompanying the *Government Response* to the Report claimed that copyright legislation

> must reflect the legal recognition of the exclusive right of a creator to determine the use of a work.... Canadians' self-expression and future cultural development are largely dependent on the vitality of our publishing, film, recording and broadcasting industries *but, above all, on Canadian creators for whom we must provide encouragement and protection.*[90]

The Subcommittee's recommendations have not lived up to its aims. Moral rights have been clarified only to a point; their theoretical expansion has been nullified by allowing waiver and assignment. If the Report's proposal as implemented by Bill C-60 becomes law, moral rights will in practice virtually disappear from

---

[88] *Copyright Act*, s. 12(7) (see *supra*, note 10); see also, *Snow* v. *The Eaton Centre Ltd*, *supra*, note 26; *Crocker* v. *Papunya Tula Artists Pty Ltd*, *supra*, note 36 (omission of short introduction to art catalogue not a "material alteration" of editor's work). French courts too apply an aesthetic test when considering whether adaptations retain the original work's essential spirit, character and substance: Da Silva, *supra*, note 16 at 35.

[89] *Supra*, note 8 at 4.

[90] Ministers' letter dated February 7 1986 accompanying the *Government Response*, *supra*, note 32 at 2 (emphasis added).

the landscape. The *Government Response* to the Report, avowedly for the purpose of protecting creators from abuse, has not fundamentally changed this position: it has simply ensured that moral rights will disappear for some unspecified arbitrary period of time.

Unless the provisions of Bill C-60 are changed along the lines suggested, the result will be to frustrate two of the Report's other stated goals: to reward creative activity and to recognize the major importance of cultural enterprises. Cultural enterprises ultimately depend upon creative individuals. To diminish the individual's control over his or her creative activity is ultimately to remove the foundation upon which any cultural edifice is based. The *Government Response* said as much in explicit terms.[91] Regrettably, these sentiments were forgotten when the Response and Bill C-60 came to deal with moral rights.

---

[91] See text accompanying previous footnote.